

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF TRANSPORTATION

In the Matter of the Application of Marie Riley for an Advertising Device Permit on Highway 169 at M.P. 71.6 in Nicollet County

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on February 2, 2010, at the Office of Administrative Hearings. The record closed on February 19, 2010, upon receipt of the last post-hearing submission.

David Phillips, Assistant Attorney General, appeared for the Department of Transportation. Michael K. Riley, Esq., Mackenzie & Gustafson Ltd., appeared for Marie Riley (Applicant).

Justin P. Weinberg, Gislason & Hunter LLP, filed a Notice of Appearance on behalf of Cambria Co., but Cambria did not appear at or participate in the hearing.

**STATEMENT OF THE ISSUES**

1. Did the Department of Transportation properly deny the application for an advertising device permit under Minn. Stat. § 173.08, subd. 1 (2008)?<sup>1</sup>

2. Did the Department properly require the removal of the advertising sign located on Highway 169 at M.P. 71.6?

The Administrative Law Judge concludes that the Department of Transportation's denial of the application should be affirmed, and the sign should be removed. The sign is not subject to any of the exceptions contained in the statutes.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

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<sup>1</sup> All references to Minnesota Statutes are to the 2008 edition; all references to Minnesota Rules are to the 2007 edition.

## FINDINGS OF FACT

1. The Highway Beautification Act, 23 U.S.C. § 131(c), requires states receiving federal-aid highway funds to effectively control the erection and maintenance of outdoor advertising signs, displays, and devices within 660 feet of the nearest edge of the right-of-way of any interstate highway or primary highway (which includes any highway on the National Highway System). “Effective control” means, in general, that no new advertising signs, displays, or devices are permitted within areas adjacent to the U.S. highway system, unless the areas are zoned industrial or commercial under state law.<sup>2</sup> There is an exception for signs, displays, or devices that advertise activities conducted on the property on which they are located.<sup>3</sup> There is also an exception for signs lawfully in existence on October 22, 1965, if states have properly designated them as historic or artistic landmarks, and if such designations are approved by the Federal Highway Administration.<sup>4</sup>

2. State law similarly prohibits advertising devices in areas adjacent to U.S. highways, except in business areas, or when the device advertises activities conducted on the property on which it is located.<sup>5</sup>

3. U.S. Highway 169 is part of the federal primary highway system in Minnesota.<sup>6</sup>

4. The State of Minnesota did not designate any outdoor advertising signs in existence on October 22, 1965, as historic or artistic landmarks.<sup>7</sup>

5. The Lee Boyum Trust owns property on the west side of Highway 169 in Lake Prairie Township outside of St. Peter, Minnesota. It is referred to in the record as the “silo property,” because it contains a large barn with a silo, which is adjacent to the highway and visible to travelers. The silo is approximately 55 feet tall and 25 feet in circumference.<sup>8</sup> The silo property and the surrounding area are zoned as a Conservancy District under Nicollet County ordinances. A conservancy district contains either a valuable natural resource that should be protected or is not otherwise suitable for agricultural production or urban development, because of wetlands, woodlands, or steep slopes.<sup>9</sup>

6. During the 1980s, Donald Hentges owned the silo property and acreage to the north. Hentges developed some of the land north of the silo property into a platted subdivision known as Riverview Hills North. He built roads in the subdivision in compliance with Township specifications, and in November 1980, the Township accepted the dedication of the roads within the subdivision. It reached an agreement

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<sup>2</sup> 23 U.S.C. § 231(d).

<sup>3</sup> 23 U.S.C. § 231(c)(3).

<sup>4</sup> 23 U.S.C. § 231(c)(4).

<sup>5</sup> Minn. Stat. § 173.08, subd. 1(3) & (8); see also Minn. R. 8810.0200, subp. 6.

<sup>6</sup> Ex. 24.

<sup>7</sup> Testimony of Scott Robinson.

<sup>8</sup> Ex. 18 at page 2; Ex. 22.

<sup>9</sup> Ex. 21.

with Hentges that he would maintain and plow the roads until ten houses were constructed, at which time the Township would assume responsibility for maintaining and plowing the roads. Valley View Road connects the homes in the subdivision to Highway 169.<sup>10</sup>

7. Hentges was a distributor of Coca Cola products. By the early 1980s, he had painted the silo to resemble a can of Coke, with the notation "Coke available here."<sup>11</sup> At some point in the early 1990s, someone else purchased the silo property and repainted the silo to look like a can of 7UP. At the bottom of the 7UP sign was the notation "Available here and everywhere." The property owner offered 7UP for sale on the property through a pre-mix dispensing machine. He did not sell any other products on the premises.<sup>12</sup>

8. Nicollet County has no record of any permits issued for the Coke or 7UP signs painted on the silo.<sup>13</sup> The Department has no record of taking any enforcement action against the Coke or 7UP signs. The state's outdoor advertising coordinator and the outdoor advertising technician for this district believe that the Coke and 7UP advertisements were considered on-premise advertising at the time, because those products were offered for sale at that location by the silo owners.<sup>14</sup>

9. In 1991, Michael Riley and Marie Riley purchased a home on 14 acres of property at 37989 Valley View Road, north of the silo property and on the other side of Valley View Road.<sup>15</sup>

10. The silo property does not adjoin the property owned by the Rileys. The two parcels are separated by Valley View Road.<sup>16</sup>

11. Michael Riley is an attorney who practices at Mackenzie & Gustafson, Ltd., in St. Peter. He is also the Nicollet County Attorney. Marie Riley operated a custom picture framing shop in downtown St. Peter from 2002 to 2008, at which time she moved the shop into the garage next to their home on Valley View Road. She applied for and obtained a zoning permit from Nicollet County to operate the picture framing business as a Level 1 home occupation, which is a permitted use in a Conservancy District.<sup>17</sup> The name of the business is Creative Conservation Framing. Mrs. Riley does not keep retail hours but operates by appointment only.<sup>18</sup>

12. Mr. Riley's law firm has represented Cambria Co., a privately held, family-owned company located in Eden Prairie, Minnesota. It manufactures quartz surfaces

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<sup>10</sup> Ex. 4; Ex. 19.

<sup>11</sup> Testimony of Michael Riley.

<sup>12</sup> Test. of M. Riley.

<sup>13</sup> Ex. 3.

<sup>14</sup> Test. of S. Robinson; Testimony of Bradley Bruegger.

<sup>15</sup> Ex. 5.

<sup>16</sup> Ex. 19.

<sup>17</sup> Ex. 6.

<sup>18</sup> Ex. 10, Ex. 18.

used in making countertops and other products for home interiors. The owners of Cambria were originally from St. Peter, Minnesota.<sup>19</sup>

13. In May or June 2009, Cambria re-painted the silo, after obtaining permission from the Lee Boyum Trust, with the Cambria logo and the word "Cambria."<sup>20</sup> On June 17, 2009, Cambria paid Mr. Boyum \$6,600, the first of ten anticipated annual payments, for the right to promote Cambria on the silo.<sup>21</sup>

14. On June 22, 2009, the Department of Transportation issued a Notice of Violation to Cambria, advising it that because no permit had been issued pursuant to Minn. Stat. § 173.13, subd. 1, the sign had to be removed.<sup>22</sup>

15. On July 14, 2009, Cambria wrote to Lee Boyum, asking him to sign a written agreement commemorating the oral discussions concerning the silo. It is unclear whether Mr. Boyum ever signed the agreement. The copies of the proposed agreement that are in the record are not signed.<sup>23</sup>

16. On August 13, 2009, Cambria executed a document entitled "Assignment of Lease," which purported to assign to Marie A. Riley "all its right, title and interest" in the silo lease between Cambria and Boyum, provided that Cambria would retain "any and all obligations of the subject Lease with respect to repair and maintenance of the leased property." The Assignment of Lease authorized Ms. Riley to paint on the silo her telephone number and information that Cambria products could be ordered at her place of business. According to the document, Ms. Riley's place of business "adjoins and connects with the leased property, thereby making it a part thereof during the terms of the Lease."<sup>24</sup>

17. On August 18, 2009, Mr. Riley filed an application for an advertising device permit with the Department of Transportation, on behalf of Marie Riley. The cover letter stated that Mrs. Riley intended to sell, "on a very limited basis, Cambria products, along with her custom framing shop activities which is located on property immediately adjoining the 'silo' property, to the north."<sup>25</sup>

18. On August 24, 2009, the Department advised Mrs. Riley that the application for a permit was denied because advertising devices are not allowed on conservancy zoned land under Minn. Stat. ch. 173.<sup>26</sup> Mrs. Riley requested reconsideration of the denial.

19. On September 25, 2009, the Department further advised the Rileys that a permit would not be issued because off-premises signs were permitted only in areas

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<sup>19</sup> Test. of M. Riley.

<sup>20</sup> Ex. 17 (photo).

<sup>21</sup> Ex. 15 (letter dated July 14, 2009, from Peter Martin to Lee Boyum).

<sup>22</sup> Ex. 17.

<sup>23</sup> Ex. 15 (letter dated July 14, 2009, from Peter Martin to Lee Boyum).

<sup>24</sup> Ex. 15.

<sup>25</sup> Ex. 18.

<sup>26</sup> Ex. 23.

zoned for business, industrial, or commercial activities. In addition, the Department advised them that the sign was not an on-premise sign because it does not advertise activities conducted on the property on which the sign is located. The Department directed the Rileys to remove the sign within 30 days.<sup>27</sup>

20. On October 14, 2009, Marie Riley requested a contested case hearing. She contended at that time that the silo was a historic landmark and a permitted use in advertising a home occupation.

21. On October 26, 2009, Cambria and Marie Riley entered into an agreement authorizing Marie Riley to display and sell Cambria products from her garage at 37989 Valley View Road in St. Peter. Cambria agreed to pay Mrs. Riley a 3% commission on the retail price of all Cambria jobs sold from this location.<sup>28</sup>

22. The silo sign now contains, in addition to the Cambria logo and the word "Cambria," the following notation at the bottom:

Sold Here by Appointment

1 (866) CAMBRIA<sup>29</sup>

23. The above telephone number is answered by Cambria customer service personnel at the Eden Prairie sales office. A caller who asks where Cambria products can be purchased would be directed to a nearby showroom where Cambria products are sold. Someone calling from the St. Peter area would be directed to St. Peter Lumber Co. in St. Peter; Lloyd Lumber in North Mankato; Cherry Creek Cabinet Works in Mankato; or Cambria Quartz Surfaces in Mankato. According to Cambria, Mrs. Riley's cell phone number would be provided only if the caller specifically requested an appointment at the silo site;<sup>30</sup> however, a customer service representative informed a Department investigator in January 2010 that there was no showroom at the silo location and that the silo was used just for advertising purposes.<sup>31</sup>

24. Mrs. Riley has a Cambria display board in her picture framing shop.<sup>32</sup> She has not made any sales of Cambria products to date and has earned no commissions.<sup>33</sup>

25. The Notice and Order for Hearing in this matter was issued on November 5, 2009.

26. On December 22, 2009, the zoning permit for Marie Riley's framing business was amended to include sales of Cambria products.<sup>34</sup>

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<sup>27</sup> Ex. 2.

<sup>28</sup> Ex. 8.

<sup>29</sup> Ex. 1; Ex. 20.

<sup>30</sup> Ex. 14.

<sup>31</sup> Ex. 13.

<sup>32</sup> Ex. 9.

<sup>33</sup> Test. of M. Riley.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Department provided notice of the hearing and the matter is properly before the Commissioner of Transportation and the Office of Administrative Hearings under Minn. Stat. § 173.13, subd. 10.

2. The Department gave timely notice of the hearing to the parties.

3. Pursuant to Minn. R. 1400.7300, subp. 5, the Applicant, Marie Riley, has the burden of establishing that the permit application should be granted.

4. The Minnesota Outdoor Advertising Control Act, Minnesota Statutes ch. 173, was adopted for the purpose of complying with 23 U.S.C. § 131.<sup>35</sup>

5. The Minnesota Outdoor Advertising Control Act provides that no advertising device shall be erected or maintained in any adjacent area unless a permit is first obtained from the Commissioner.<sup>36</sup>

6. An “advertising device” means any sign, display, or device visible to and primarily intended to advertise and inform or attract the attention of operators and occupants of motor vehicles.<sup>37</sup>

7. The Cambria sign is an advertising device under Minn. Stat. § 173.02, subd. 16.

8. Minn. Stat. § 173.08, subds. 1(3) and 1(8), provide, in relevant part, that no advertising device shall be erected or maintained in an adjacent area, after June 8, 1971, except for (1) advertising devices advertising activities conducted on the property on which they are located, and (2) advertising devices which are located in business areas.

9. An “on-premise sign” means an advertising device located on the premises or contiguous property of an individual, business, or organization when the sale or lease of the premises or the identification, products, or services of the individual, business, or organization are the subject of the advertising device.<sup>38</sup>

10. Federal regulations provide that a sign that consists solely of the name of the establishment or which identifies the establishment’s principal or accessory products or services offered on the property is an on-property sign; however, a sign that brings

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<sup>34</sup> Ex. 7.

<sup>35</sup> Minn. Stat. §§ 173.01; 173.185; 173.27.

<sup>36</sup> Minn. Stat. § 173.13, subd. 1.

<sup>37</sup> Minn. Stat. § 173.02, subd. 16.

<sup>38</sup> Minn. R. 8810.0200, subp. 6.

rental income to the property owner shall be considered the business of outdoor advertising and not an on-property sign.<sup>39</sup>

11. The Cambria sign advertises activities conducted on premises other than the silo property; it brings rental income to the property owner; and it is properly considered an off-premise advertising device as opposed to an on-premise sign.

12. A “business area” means any part of an adjacent area which is (a) zoned for business, industrial, or commercial activities under the authority of any law of this state or any political subdivision thereof; or (b) not so zoned, but which constitutes an unzoned commercial or industrial area.<sup>40</sup>

13. Both the silo property and Marie Riley’s picture framing business are located in an area zoned as a conservancy district. They are not located in a “business area” or an “unzoned commercial or industrial area” as defined in Minn. Stat. § 173.02, subd. 17.

14. Federal law provides that any sign not lawfully erected shall be removed by the owner of such sign. If an owner does not remove a sign, the State shall remove the sign, and the owner of the removed sign shall be liable to the State for the costs of such removal.<sup>41</sup> In addition, state law provides that advertising devices erected or maintained after June 8, 1971, which are not in compliance with Minn. Stat. chapter 173, may be removed by the commissioner upon 60 days prior written notice by certified mail to the owner thereof and to the owner of the real property on which such advertising device is located.<sup>42</sup>

15. The Department of Transportation properly denied the application for an outdoor advertising device permit for the Cambria sign and properly directed its removal for noncompliance under Minn. Stat. § 173.13, subd. 11.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

The Department’s denial of the advertising device permit and order to remove the Cambria sign located on Highway 169 at M.P. 71.6 in Nicollet County should be AFFIRMED.

Dated: February 25, 2010

s/Kathleen D. Sheehy  
KATHLEEN D. SHEEHY  
Administrative Law Judge

<sup>39</sup> 23 C.F.R. § 750.709(a) & (b).

<sup>40</sup> Minn. Stat. § 173.02, subd. 17.

<sup>41</sup> 23 U.S.C. § 131(r)(1) & (2).

<sup>42</sup> Minn. Stat. § 173.13, subd. 11.

## NOTICE

This report is a recommendation, not a final decision. The Commissioner of Transportation will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. A final decision shall not be made until this Report has been made available to the parties for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument. The agency shall notify the parties and the Administrative Law Judge of the date when the hearing record closed. Pursuant to Minn. Stat. § 14.62, subd. 2a, this Report will constitute the final decision in this case unless the agency modifies or rejects it within 90 days after closure of the record. Parties should contact Nandana Perera, Staff Attorney, Office of Chief Counsel, Minnesota Department of Transportation, MS 290, 395 John Ireland Boulevard, St. Paul, MN 55155-1899, (651) 366-3144, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

The Applicant advances two reasons why she believes the permit should be granted. First, she maintains that the silo is not an advertising device because its primary purpose is not for advertising. As noted above, an “advertising device” means any sign, display, or device visible to and primarily intended to advertise and inform or attract the attention of operators and occupants of motor vehicles.<sup>43</sup>

The Applicant contends that the silo’s primary purpose is as a building used for animal husbandry and other storage. In support of this argument, the Applicant cites *State v. Malcolm, Inc.*, C7-00-1084 (Minn. App. 2001) (unpublished). In that case, a business owner placed a sign advertising its business (an adult bookstore) on a trailer parked on its own property, in a location less than 500 feet from a highway. The property was in a business area, and pursuant to Minn. Stat. § 173.16, subd. 4, advertising devices in business areas must not be placed within 500 feet of a highway. The Department sought injunctive relief in district court, which granted summary judgment to the Department and ordered a permanent injunction against the placement of any advertising device in the area. On appeal, the business owner argued that there was a factual dispute as to the primary purpose of the trailer; it argued that the trailer was used to store tools, equipment, and construction materials used to operate its business and that it was parked at that location simply because the location was easily accessible to the highway. It contended the signage placed on the trailer was no

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<sup>43</sup> Minn. Stat. § 173.02, subd. 16.



different than the unregulated advertising regularly placed on vehicles, trailers, and buses. The court of appeals reversed, agreeing that there was a factual dispute as to whether the primary purpose of the trailer was to function as an advertisement.

This case provides no persuasive support for the Applicant. First, the issue in *Malcolm* was whether the trailer was parked at that location primarily for the purpose of advertising the business or whether it was legitimately used to transport equipment used for the business and was parked at that location merely for the convenience of the business owner. It does not stand for the proposition that a sign advertising an unrelated business may be erected on a permanent structure, such as a silo, if the structure serves some other primary purpose.<sup>44</sup> Second, there is no dispute here that the signage was placed on the silo for the purpose of promoting Cambria products. The silo owner is not associated with Cambria in any way and was paid to allow Cambria to paint the sign on the silo. The sign is primarily intended to advertise Cambria products by informing or attracting the attention of passing drivers. It is therefore an advertising device that requires a permit from the Department.

The Applicant's second argument is that the sign is an on-premise sign that advertises products sold at her framing shop. This argument is based on the contention that the Riley property and the Boyum property are contiguous and adjoining based on "general principles of real estate law which extends ownership of property to the middle of the road, in cases where fee title to the road is not in a public entity." The Applicant has not cited any law in support of this proposition, and as a factual matter, it conflicts with the record evidence regarding both the public dedication of Valley View Road and the boundaries of the Riley and Boyum properties.<sup>45</sup>

More importantly, however, it is immaterial whether the Riley property is contiguous to or adjoining the Boyum property. An on-premise sign is one that advertises activities conducted on the property on which it is located.<sup>46</sup> The rule, consistently with the statute, defines an "on-premise sign" as an advertising device "located on the premises or contiguous property of an individual, business, or organization" when the products or services of the individual, business, or organization are the subject of the advertising device.<sup>47</sup> The intent of the rule is clearly to allow a business owner to post an advertising sign on the business premises, or on contiguous property owned by that same entity. In this case, the advertising sign is on property owned by the Boyum Trust; the business is or would be conducted on property owned by the Rileys. Even if the properties were not separated by Valley View Road, the Cambria sign could not be considered to be on Marie Riley's premises.

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<sup>44</sup> Even if it did stand for this proposition, there is no evidence in the record as to whether the current owner of the silo uses it for agricultural purposes.

<sup>45</sup> See Ex. 4 (township resolution accepting dedication of roads as public roads); Ex. 19 (identifying property lines on either side of Valley View Road). These exhibits were received by stipulation of the parties.

<sup>46</sup> Minn. Stat. § 173.08, subds. 1(3) and 1(8).

<sup>47</sup> Minn. R. 8810.0200, subp. 6.

The Applicant also maintains that Cambria's assignment to her of the benefits of the lease with the Boyum Trust provides her with a sufficient interest in the silo property to support her claim that it is an on-premise sign. Assuming that there is a lease and that its benefits could be assigned to Ms. Riley, this argument appears to have been rejected by the Minnesota Supreme Court in *State by Spannaus v. Lutsen Resorts, Inc.*, 310 N.W.2d 495 (Minn. 1981). In that case, the Supreme Court reversed the trial court's dismissal of a petition to condemn an advertising sign that was owned by Lamb's Campground but located on land belonging to relatives pursuant to an oral lease, where "[n]o part of the campground activities [was] conducted on the land bearing the sign." Because Ms. Riley conducts no business activity on the silo property, the sign is properly considered an off-premise sign that is prohibited by the Minnesota Outdoor Advertising Control Act.

Because a permit could not be issued to approve the Cambria sign, the Administrative Law Judge recommends that the Commissioner direct the Applicant to remove the sign by painting out the Cambria logo as soon as the weather makes painting feasible, perhaps within 60 days of the Commissioner's final decision.

**K.D.S.**